

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

BILLY L. McSHEPARD, <i>Pro Se</i> ,	)	Case No.: 1:09 CV 2042
	)	
Petitioner	)	JUDGE SOLOMON OLIVER, JR.
	)	
v.	)	
	)	
FRANK SHEWALTER, WARDEN,	)	
	)	
Respondent	)	<u>ORDER</u>

On September 2, 2009, Petitioner Billy McShepard, *pro se* (“Petitioner”), filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) The Petition is based on fifteen grounds:

1. Felonious Assault on a Peace Officer/Amendments, 4, 5, 6, and 14.
2. Receiving Stolen Property/Amendments, 4, 5, 6, and 14.
3. Ineffective Assistance of Appellate Counsel/ Amendments 4, 5, 6, and 14.
4. Drug Trafficking, Marijuana/Amendments, 4, 5, 6, and 14.
5. Possession of Cocaine/Amendments, 4, 5, 6, and 14.
6. Ineffective Assistance of Appellate Counsel/Amendments, 4, 5, 6, and 14.
7. Ineffective Assistance of Trial Counsel/Amendments, 4, 5, 6, and 14.
8. The Petitioner was not Judged by An Impartial Jury of His Peers violating the Petitioner [sic] Due Process Right to a Fair Trial/Amendments, 4, 5, 6, and 14.

9. Petitioner [sic] Trial Counsel failed to object and the Judge allowed Prosecutorial Statements Calculated to Incite the Passions and Prejudice of the Jurors Violations [sic] Due Process right to A fair Trial./Amendments, 4, 5, 6, and 14.

10. Petitioner [sic] Trial Counsel failed to object to and The Judge Improperly Instructed the Jury of the Inapplicable Doctrine of Transferred Intent./Amendments, 4, 5, 6, and 14.

11. Petitioner [sic] Trial Counsel and the Judge failed to Apply the Proper Legal Defenses to the Facts of the Petitioner Position Violation of Due Process Right/Amendments, 4, 5, 6, and 14.

12. Self Defense, Due Process Right to Present the Petitioner [sic] Full Defense/Amendment, 4, 5,6, and 14.

13. Lesser Included Offense of Aggravated Assault Due Process Right to have a Jury Properly Instructed on all Matter of The Law, Disaproportionate [sic] Sentence with the Crime Alleged./Amendments, 4, 5, 6, and 14.

14. Missing Transcripts/Amendments, 4, 5, 6, and 14.

15. These Issues Herein Cumulatively Rendered the Petitioner [sic] Trial Fundamentally Unfair Violation of the Petitioner [sic] Due Process Rights/Amendments, 4, 5, 6, and 14.

(Pet. at 7-14.)

This case was referred to Magistrate Judge George J. Limbert for preparation of a report and recommendation. The Magistrate Judge issued his Report and Recommendation (“R&R”) on December 23, 2010, recommending that the Petition be dismissed in its entirety with prejudice. (ECF No. 24.) Specifically, the Magistrate Judge concluded that: (1) grounds one and two should be dismissed because the state courts did not unreasonably apply clearly established law; (2) a portion of ground three is not cognizable on federal habeas review and as to the other portion, neither trial nor appellate counsel’s performance was deficient; and (3) grounds four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen have been procedurally defaulted. (R & R at 12-26.)

Petitioner filed an Objection to the R&R (“Objection”) on January 25, 2011. (ECF No. 26.) Petitioner stated that he “strongly disagree[d]” with the R&R because two of the grounds had not been previously raised due to the ineffective assistance of appellate counsel, and grounds one, two, three, six through thirteen, and fifteen should have been decided on the merits. (Objection at 1-2.) The court finds none of these arguments to be persuasive.

The court finds that after *de novo* review of the Report and Recommendation and all other relevant documents, the Magistrate Judge’s conclusions are fully supported by the record and controlling case law. Accordingly, for the reasons stated by the Magistrate Judge, the court adopts as its own the Magistrate Judge’s Report and Recommendation. (ECF No. 24.)

Consequently, McShepard’s Petition is hereby dismissed with prejudice on grounds four through fifteen procedurally defaulted, and the part of ground three not cognizable on federal habeas review, denied on grounds one, two, and three decided on the merits, and final judgment is entered in favor of Respondent. The court further certifies that pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR. \_\_\_\_\_  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT

February 28, 2011